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September 30, 2002

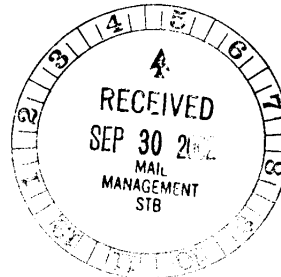
## VIA HAND DELIVERY

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
Case Control Unit - Suite 700  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

ENTERED  
Office of Proceedings

SEP 30 2002

Part of  
Public Record



RE: *Finance Docket No. 33556, Canadian National Railway Company, et al --  
Control -- Illinois Central Corporation, et al*

Dear Secretary Williams:

Enclosed herewith is an original and 11 copies of the Reply of The Kansas City Southern Railway Company in Support of the Petition for Reconsideration of Atofina Petrochemicals, Inc. in the above captioned proceeding.

Please date stamp one copy of the filing and return the stamped copy to the messenger. If you have any questions about this matter, please contact me at your convenience.

Sincerely,

William A. Mullins

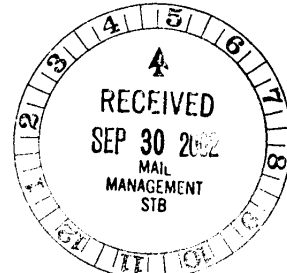
Enclosure

cc: All known parties of record

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**FINANCE DOCKET NO. 33556**



**CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION,  
AND GRAND TRUNK WESTERN RAILROAD INCORPORATED  
- CONTROL -**

**ILLINOIS CENTRAL CORPORATION, ILLINOIS CENTRAL RAILROAD  
COMPANY, CHICAGO, CENTRAL & PACIFIC RAILROAD COMPANY, AND  
CEDAR RIVER RAILROAD COMPANY**

**REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY  
IN SUPPORT OF THE PETITION FOR RECONSIDERATION  
OF ATOFINA PETROCHEMICALS, INC.**

**ENTERED  
Office of Proceedings**

**SEP 30 2002**

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**Attorneys for The Kansas City Southern  
Railway Company**

**September 30, 2002**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 33556**

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**CANADIAN NATIONAL RAILWAY COMPANY, GRAND TRUNK CORPORATION,  
AND GRAND TRUNK WESTERN RAILROAD INCORPORATED  
- CONTROL -  
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**REPLY OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY  
IN SUPPORT OF THE PETITION FOR RECONSIDERATION  
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**PREFACE AND SUMMARY OF ARGUMENT**

Pursuant to 49 C.F.R. §1115.3(d), The Kansas City Southern Railway Company ("KCS") respectfully submits this Reply in support of the September 10 Petition of ATOFINA Petrochemicals, Inc. ("ATOFINA") for Reconsideration of the Board's Decision<sup>1</sup> denying the Joint Petition of ATOFINA and KCS (collectively "Petitioners") for Oversight, Interpretation and Enforcement of Merger Conditions in the CN/IC merger proceeding.<sup>2</sup> ATOFINA's Petition should be granted.

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<sup>1</sup> *Canadian National Ry. Co., Grand Trunk Corp. and Grand Trunk Western R.R. Inc--Control--Illinois Central Corp., Illinois Central R.R. Co., Chicago, Central and Pacific R.R. Co., and Cedar River R.R. Co.*, STB Finance Docket No. 33556, Decision No. 39 (STB served August 23, 2002) ("Decision No. 39").

<sup>2</sup> *Canadian National Ry. Co., Grand Trunk Corp. and Grand Trunk Western R.R. Inc--Control--Illinois Central Corp., Illinois Central R.R. Co., Chicago, Central and Pacific R.R. Co., and Cedar River R.R. Co.*, STB Finance Docket No. 33556, Decision No. 37 (STB served May 25, 1999) ("CN/IC").

In the end, stripped of the rhetoric from all sides, the prior precedents establish that the Board should grant the requested relief. Here, you have a shipper, ATOFINA, who is located in the Geismar area. This shipper has established that it had discussions with KCS during the Geismar proceeding about using the KCS Geismar line if it had been built. This shipper admits that it would have had to build a line to access the KCS Geismar line if such a KCS line had been built. It is also factually true that if ATOFINA had built its own line to the point that it would have connected with the KCS line, ATOFINA would have been in the exact geographic location and in the exact legal, procedural, and competitive posture as Rubicon, Uniroyal, and Vulcan were prior to the CN/IC merger. Now, ATOFINA is saying that it is willing to build such a line to the point at which it would have reached the KCS line. Accordingly, if it builds such a line, ATOFINA wants to be treated the same as Rubicon, Uniroyal, and Vulcan were treated in the *CN/IC* decision and requested the Board to declare that it would get such similar treatment if it built its line. Obviously, ATOFINA desires such a ruling before it builds its line; otherwise, its line build-out would be for naught.

The Board denied ATOFINA's request. Such a denial was in large part based upon an alleged procedural infirmity, *i.e.* ATOFINA had not established that the *CN/IC* merger should be reopened. However, ATOFINA had shown significantly changed circumstances that had occurred since the original *CN/IC* decision was issued. Additionally, ATOFINA established that the Board changed its precedent when it declared that ATOFINA did not show its build out was feasible and therefore the relief should be denied. In denying the Joint Petition, the Board committed material error.

The Board's decision was in error because it (1) imposed a requirement that ATOFINA meet the requirements for reopening a proceeding when the Board should and could have used

its retained Oversight authority; (2) when applying the reopening standard, the Board did not fully consider the “changed circumstances” which ATOFINA has now completely addressed; (3) it imposed a requirement that ATOFINA first establish that its proposed build-out is “feasible” before the Board would consider whether or not to grant ATOFINA’s request to be added to the Geismar Condition; and (4) it placed too much emphasis on the ability of the private sector to negotiate a solution when CN has rejected such private sector solutions advocated by both ATOFINA and KCS. The Petition for Reconsideration gives the Board an opportunity to correct its error. It should do so.<sup>3</sup>

## **ARGUMENT**

### **I. THE BOARD SHOULD NOT HAVE IMPOSED A REQUIREMENT THAT THE JOINT PETITIONERS MEET THE REOPENING TEST**

In their Joint Petition, ATOFINA and KCS expressly sought oversight, interpretation, and enforcement of the “Geismar Condition”<sup>4</sup> imposed by the Board in the *CN/IC* merger decision. The Joint Petition was filed under the Board’s expressly retained authority to oversee the conditions imposed in *CN/IC*. Indeed, in the *CN/IC* merger decision, the Board imposed a five year oversight requirement to “impose additional conditions and/or take other action . . . to address matters . . . regarding the operation of the Alliance Agreement, particularly with respect to ongoing competition within the Baton Rouge-New Orleans corridor.”<sup>5</sup>

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<sup>3</sup> The Joint Petition was supported by the nation’s two largest shipper organizations: The National Industrial Transportation League (“NITL”) and the American Chemistry Council (“ACC”). Unfortunately, it appears that the ACC letter was received too late for consideration by the Board. The Board should now give full consideration to ACC’s comments.

<sup>4</sup> *CN/IC* at 32-33, Ordering ¶ 7 at 57, Commissioner Clyburn, commenting at 62, and Appendix C, at 107-113 (collectively, the “Geismar Condition”).

<sup>5</sup> *CN/IC* Decision No. 37 at 56, Ordering Paragraph No. 1.

Due to the lack of competitive concerns, the Board issued a notice on November 7, 2001, soliciting comments from the public on whether or not it should end its five year oversight early.<sup>6</sup> Pursuant to the request for comment, ATOFINA and KCS specifically filed comments on November 27, 2001 noting that CN, KCS, and ATOFINA were in discussions regarding whether or not ATOFINA qualified for the Geismar Condition. While ATOFINA and KCS did not object to ending the oversight period early, they specifically requested that the Board remain available to address the CN/KCS/ATOFINA issue if necessary. Indeed, when the Board issued its decision terminating its oversight, the Board specifically stated that it would “remain available to consider and promptly resolve disputes relating to KCS’s access to shippers under any of the conditions we have imposed.”<sup>7</sup>

Pursuant to the Board’s determination that it would remain available to “impose additional conditions and/or take other action” in the *CN/IC* decision, ATOFINA and KCS filed their Joint Petition on June 18, 2002. Based upon the Board’s specific comments regarding its continuing authority to oversee the merger and its conditions, particularly with regard to “competition within the Baton Rouge-New Orleans corridor,” ATOFINA and KCS thereby expressly sought oversight, interpretation, and enforcement of the “Geismar Condition,” and did not specifically address the standards for reopening, which require proving changed circumstances or material error before the Board would reopen the merger proceeding. There

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<sup>6</sup> *Canadian National Ry. Co., Grand Trunk Corp. and Grand Trunk Western R.R. Inc--Control--Illinois Central Corp., Illinois Central R.R. Co., Chicago, Central and Pacific R.R. Co. and Cedar River R.R. Co.*, STB Finance Docket No. 33556 (Sub-No. 4), Decision No. 3 (General Oversight) (STB served November 7, 2001).

<sup>7</sup> *Canadian National Ry. Co., Grand Trunk Corp. and Grand Trunk Western R.R. Inc--Control--Illinois Central Corp., Illinois Central R.R. Co., Chicago, Central and Pacific R.R. Co. and Cedar River R.R. Co.*, STB Finance Docket No. 33556 (Sub-No. 4), Decision No. 4 at 3 (General Oversight) (STB served Dec. 27, 2001).

was no need to address those standards because the Board still retained its oversight authority.

As the Board's decision made clear, however, it did in fact impose a reopening standard.

Having imposed a reopening standard, the Board denied the Joint Petition on the basis that ATOFINA and KCS had not met the standards for reopening.<sup>8</sup> Indeed, the Board acted on a reopening standard despite the fact that KCS and ATOFINA had filed a Correction and Opposition pleading which, among other things, requested the opportunity to "specifically address the grounds for reopening if the Board elects to so treat the proceeding . . . rather than ruling as a matter of interpretation, enforcement and oversight as requested."<sup>9</sup> Moreover, Petitioners also reiterated in this latter pleading that they were fully prepared to demonstrate "substantially changed circumstances" which would constitute good cause for reopening the CN/IC Merger, *CN/IC*, Decision 39 at 6; 49 U.S.C. § 722(c), were the Board to find such a step necessary in considering the Joint Petition's proposals.

Nonetheless, the Board denied this request and imposed a reopening standard without granting ATOFINA and KCS an opportunity to address that standard. In cursorily and summarily dismissing the Petitioner's argument that the Board should treat the Joint Petition under its oversight authority rather than as a request to reopen the merger, the Board imposed a materially different evidentiary burden on ATOFINA and KCS than would have been required for mere interpretation and oversight of the CN/IC merger.<sup>10</sup> The Board acted even though KCS

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<sup>8</sup> *CN/IC* Decision No. 39 at 6.

<sup>9</sup> Correction and Opposition to Holding Proceeding in Abeyance at 1 n.1 (STB Finance Docket No. 33556) (August 12, 2002).

<sup>10</sup> Cf. *Georgia-Pac. Corp. - Petition for Declaratory Order - Certain Rates, and Practices of Oneida Motor Freight, Inc.*, 9 I.C.C. 2d 103, 135 (ICC served November 13, 1992) (affording defendant a further opportunity to demonstrate that its rates were not unreasonable in light of changed circumstances).

and ATOFINA never had the opportunity to demonstrate good cause for reopening, and in doing so, materially and substantially prejudiced both KCS and ATOFINA. As a result, it was material error and a fundamental denial of due process for the Board to announce on the one hand that it would apply its oversight standards with respect to the Geismar Condition, but then, when a petition was filed under such oversight authority, change its standard and apply a reopening standard, without giving ATOFINA and KCS an opportunity to file evidence to meet that standard.<sup>11</sup>

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An even better analogy can be made to the dissenting opinion of Commissioner Stafford in *Jones Truck Lines, Inc. - Purchase (Portion) - Deaton, Inc.*, 127 M.C.C. 428, 1978 MCC LEXIS 1 (Dec. 21, 1978):

There is little question that the establishment of so-called protestants "guidelines" on proof of harm and application of the three-tier test to "new competitive service" issues (*see Central Transport, Inc. -- Purchase -- Piedmont Petroleum*, 127 M.C.C. 1 (1977)) represents a departure from existing Commission policy and precedent. It is clear that protestants had no notice that either new "guidelines" or the three-tier test would result from this proceeding. At a minimum, due process requires that the protestants be given the opportunity to meet the evidentiary requirements contained in the "guidelines" and the three-tier test.

*Id.* at \*51 (Stafford, dissenting) (emphasis added).

<sup>11</sup> Cf. *Southwest R.R. Car Parts Co. v. Missouri Pac. R.R. Co.*, 1998 STB LEXIS 71 at\*11 (STB served February 20, 1998) (allowing complainant an opportunity to introduce further evidence or argument within 60 days regarding comparable benchmarks notwithstanding the Board's initial conclusion that the complained of rate was not unreasonable high); *Kansas City Southern Industries, Inc., The Kansas City Southern Ry. Co. and K&M Newco, Inc. - Control - MidSouth Corp., MidSouth Rail Corp., MidLouisiana Rail Corp., SouthRail Corp. and TennRail Corp.*, ICC Finance Docket No. 32167, 1994 ICC LEXIS 75 at \*9 (ICC served May 4, 1994) (permitting petitioner, who had not met his evidentiary burden, a further opportunity to establish his claim required under reopening standards despite the ICC's stated uncertainty as to the validity of the claim).



**II. EVEN IF THE REOPENING STANDARD IS APPLIED, ATOFINA HAS ESTABLISHED "SUBSTANTIALLY CHANGED CIRCUMSTANCES" SO AS TO JUSTIFY REOPENING THE *CN/IC* MERGER DECISION**

As noted above, it was material error for the Board to apply the reopening standard so as to justify denial of the Joint Petition. However, now, having applied the reopening standard, the Board cannot ignore the evidence that ATOFINA presented in the Joint Petition, the Correction and Opposition pleading, and its Petition for Reconsideration. A thorough review of that evidence clearly demonstrates good cause for reopening *CN/IC* for purposes of revising the Geismar Condition because of the "changed circumstances" that ATOFINA has presented. In its Petition for Reconsideration, ATOFINA is not merely taking an "additional bite at the apple," as CN suggests in its Reply to the Petition for Reconsideration;<sup>12</sup> rather, it is now fully responding to the Board's application of the reopening standard.

ATOFINA presents two significant "changed circumstances" that warrant reopening *CN/IC*. First, the Board significantly altered its precedent and policy in the *CN/IC* merger when it granted certain shippers access to KCS not conditioned upon their construction of a build-out to the point at which they would have connected with the proposed KCS line. Now, having altered its precedent, the Board must treat all shippers who are similarly situated as Rubicon, Vulcan, and Uniroyal the same. Second, ATOFINA's economic circumstances have changed such that recent plant expansion now makes a build-out to the proposed line feasible. With the build-out, ATOFINA will place itself in the same exact competitive posture as Rubicon, Vulcan, and Uniroyal and thus deserves equal treatment.

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<sup>12</sup> See Reply of Canadian National Railway Company and Illinois Central Railroad Company to Petition of ATOFINA Petrochemicals, Inc. for Reconsideration ("CN/IC's Reply to Petition for Reconsideration") at 6.

**A. Significant Modification in STB Policy Constitutes “Substantially Changed Circumstances” Justifying Reopening of the *CN/IC* Merger Decision**

The Board significantly changed former policy in *CN/IC* when it granted certain shippers access to KCS’s haulage rights not conditioned upon their construction of a build-out to the KCS, or at a minimum, to the point at which they would have connected with the proposed KCS line. Prior Board policy, established first in the *BN/SF* merger<sup>13</sup> and reinforced in the *UP/SP* merger decision,<sup>14</sup> did provide shippers who were losing a build-in or build-out option with competitive relief, but the shipper would only be granted access to another carrier if such a shipper actually built a line to the point at which it would have connected with the carrier who was involved in the merger. If such a shipper built a line, the Board ensured that another carrier (who was not involved in the merger) would be granted trackage or haulage rights over the now-merged entity’s line so as to access the point to which the shipper built.

Thus, prior to *CN/IC*, precedent was clear that a shipper needed to actually construct a line to receive competitive relief. In fact, in a situation very similar to the situation that was faced by Rubicon, Uniroyal, and Vulcan, the Board specifically refused to extend trackage rights to the Enterprise Products Company when the latter proposed that it would build-out to UP’s proposed build-in point. In that case, Enterprise was solely served by SP, but UP proposed a build-in that would go within a mile of the Enterprise plant. Enterprise then planned to build a one-mile line to reach the proposed UP build-in. While the UP build-in case was pending, UP

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<sup>13</sup> *Burlington Northern, Inc., and Burlington Northern R.R. Co.--Control and Merger--Santa Fe Pac. Corp. and the Atchison, Topeka and Santa Fe Ry Co.*, ICC Finance Docket No. 32549, Decision No. 38 (served August 23, 1995) (hereinafter “*BN/SF* Merger”) (Oklahoma Gas and Electric Co. and Phillips Petroleum).

<sup>14</sup> *Union Pacific Corp., Union R.R. Co.,; and Missouri Pacific R.R. CO.--Control and Merger--Southern Pacific Rail Corp., Southern Pacific Transp. Co., St Louis Southwestern Ry. Co., SPCSL Corp., and the Denver and Rio Grande Western R.R. Co.*, STB Finance Docket No. 32760, (hereinafter “*UP/SP*”), Decision No. 96 (served March 21, 2002).

and SP proposed to merge. Because Enterprise was going to lose the competitive option that was going to be provided by UP, Enterprise requested that BN/SF be given trackage rights to serve the Enterprise plant. The Board rejected that approach and held that Enterprise must build-out to the UP line and if such a build-out occurred, BN/SF would be given trackage rights to reach the point at which the Enterprise build-out connected with UP.<sup>15</sup>

Accordingly, as ATOFINA has explained, at the time of the CN/IC merger, such was the state of law. Thus, given this precedent, ATOFINA believed at the time, as did KCS and CN, that Uniroyal, Vulcan, and Rubicon should not be given direct access to KCS via haulage rights, but that these shippers must first build-out to KCS before getting access to KCS. At the same time, ATOFINA was receiving assurances from CN that CN would treat the ATOFINA plant as if it were competitively served when and if ATOFINA expanded its plant capacity. Joint Petition at 6. These two facts combined adequately explain why ATOFINA did not participate in the original CN/IC merger proceeding.

In *CN/IC*, however, the Board rejected CN's and KCS's arguments and changed its longstanding policy by granting Rubicon, Uniroyal, and Vulcan access not conditioned upon whether they had actually constructed a build-out to the KCS line nor conditioned on even being required to build a line to the point at which they would have connected with the proposed KCS Geismar line. Instead, these shippers were granted direct access to KCS via haulage rights. This was a dramatic shift in policy and represents a substantially changed circumstance from prior Board precedent – one in which ATOFINA could not have predicted or foreseen.<sup>16</sup>

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<sup>15</sup> *Union Pac. Corp. – Control and Merger – Southern Pac. Rail Corp.*, 1 S.T.B. 233, 321-22 (Decision No. 44) (served Aug. 12, 1996); *UP/SP*, Decision No. 68 *passim* (served March 10, 1997)

<sup>16</sup> The Board's change in policy was also noted by the ACC in its August 26, 2002 letter to the Board, which was filed after issuance of the Board's decision.

Having seen the change in policy when the *CN/IC* decision was first issued, ATOFINA could have immediately petitioned for inclusion in the Geismar Condition, but it did not do so because, as explained below, its economic circumstances did not justify building a line to the point at which it would have been in the same geographical competitive posture as Rubicon, Uniroyal and Vulcan. Now, ATOFINA wants to build such a line, but it does not want to do so unless it can be assured that it would be given KCS access. As a point of pure factual matter, if ATOFINA builds the line, it will place itself in the same geographic and competitive position as Rubicon, Uniroyal, and Vulcan occupied before the *CN/IC* merger. Therefore, if the line is built, there would be no real distinction between these Geismar shippers and ATOFINA, and as such, ATOFINA should be treated the same.

The only difference now among ATOFINA, Rubicon, Uniroyal and Vulcan is one of concrete proximity, whereby the plants of Rubicon, Uniroyal, and Vulcan are physically closer to the proposed Geismar Line than ATOFINA. However, this distinction is remedied by ATOFINA's ability and willingness to build a line that would place it in the exact same position as those shippers accessing KCS's haulage rights.<sup>17</sup> Specifically, ATOFINA has laid out plans to build-out to the Geismar industrial district, where Rubicon, Uniroyal and Vulcan are located. Therefore, upon ATOFINA's construction of an appropriate line to the Geismar industrial district, the Board should grant it the same access to KCS's haulage rights as Rubicon, Uniroyal, and Vulcan enjoy.

In its Reply to the Petition for Reconsideration, CN argues that ATOFINA mischaracterized the Board's action with regard to Rubicon, Uniroyal, and Vulcan as

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<sup>17</sup> See Joint Petition at 8; see also ACC Letter at 3.

“overturning” the Enterprise precedent.<sup>18</sup> It is immaterial, however, whether the Board technically overturned its Enterprise decision or carved out an exception to the general build-in/build-out policy. What is relevant is that the Board did not require those three shippers to build a line to KCS nor did they require them to build a line to the point at which they would have connected with the KCS Geismar line.<sup>19</sup> Clearly, in order to be fair and equitable in its treatment of similarly-situated shippers, the Board must afford ATOFINA, who has demonstrated its ability and desire to build-out to the Geismar industrial district, the same rights as other shippers in ATOFINA’s position, when and if it builds its line.

When the Board granted Rubicon, Uniroyal, and Vulcan access to KCS, it created an exception to the general build-in/build out condition and, in effect, overruled its treatment of Enterprise Products in the *UP/SP* case. This significant shift in Board policy easily constitutes a “substantially changed circumstance” warranting reopening of the *CN/IC* merger decision as requested by ATOFINA.

**B. Various Economic Occurrences at ATOFINA Constitute “Substantially Changed Circumstances” So As To Justify Reopening the *CN/IC* Merger**

Having adequately explained why it did not participate in the *CN/IC* case, by then having seen the *CN/IC* decision, it is a fair question to ask why ATOFINA waited for three years to file for inclusion in the Geismar Condition. As ATOFINA explains, having read the *CN/IC* decision and prior precedents, ATOFINA believed that before it would be in the same pre-merger position as Rubicon, Uniroyal, and Vulcan, it still must build a line to the point at which it would have connected with the proposed KCS line. Until recently, economic circumstances would not

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<sup>18</sup> See *CN/IC’s* Reply to the Petition for Reconsideration at 10.

<sup>19</sup> In this latter sense, ATOFINA is at least willing to build a line to the point at which it would have connected with the KCS build-in.

justify such a line construction, but ATOFINA's circumstances have changed such that recent plant expansion now makes a build-out to the proposed line economically justified. Accordingly, unlike during the time of the CN/IC merger proceeding, ATOFINA now stands to benefit economically and can afford to construct a line to the Geismar industrial district.<sup>20</sup> Such a fact represents a second "substantially changed circumstance" from what existed prior to the CN/IC merger decision.

In the past, STB has never required, as CN suggests in its Reply to the Petition for Reconsideration, that the economic change in circumstances be fortuitous, rather than entirely of a shipper's own making and CN cannot point to any precedent to establish otherwise. For example, in *UP/SF*, the Board granted shippers automatic access to BN/SF's trackage rights when they completed a build-out to the point at which they would have reached a second railroad and the Board did so without the need for the shipper to return to the Board for a specific ruling that it would qualify for access to BN/SF. Moreover, in *CN/IC*, the Board granted shippers Rubicon, Uniroyal and Vulcan access to KCS's haulage rights, without regard to whether their financial circumstances would have enabled them to construct an extension to the proposed Geismar line.

The Board should, therefore, similarly grant ATOFINA access to KCS's haulage rights when it completes a build-out to the Geismar industrial district. To do so would not "constitute a windfall," as CN suggests,<sup>21</sup> but would merely grant ATOFINA the same treatment as other shippers similarly situated – *i.e.*, shippers having access to KCS at the same location. On the other hand, continuing its inequitable and arbitrary treatment of ATOFINA and other Geismar-

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<sup>20</sup> See Joint Petition at 8.

<sup>21</sup> See Reply to the Petition for Reconsideration at 12.

area shippers willing to build-out to the Geismar industrial district currently serviced by KCS would be unconscionable, and would only perpetuate the disparate treatment by the Board of similarly situated entities. Thus, ATOFINA's change in circumstances allowing it to expand its plant and build-out to the proposed line constitutes "substantially changed circumstances" justifying reopening of *CN/IC* and it was an error for the Board to not recognize these changed circumstances.

In summary, ATOFINA could not have presented the arguments above in the *CN/IC* decision because it had no knowledge that the Board was going to change its *UP/SP* precedent and grant access to the three Geismar shippers until after the STB's decision. Likewise, ATOFINA had not completed or even contemplated its plant expansion at the time, and thus did not have a reason to participate in the case to gain access to KCS. Based upon the circumstances at that time, nothing justified participation or complaint by ATOFINA. However, based upon today's "substantially changed circumstances," most notably the new STB precedent of granting access without even requiring a build-in/build-out and ATOFINA's changed financial posture making it feasible for ATOFINA to build to the point at which it would have connected with KCS, there can be no dispute that there is just cause warranting the reopening of the *CN/IC* decision.

### **III. IT WAS CONTRARY TO PRECEDENT TO ESTABLISH A FEASIBILITY TEST FOR THE ATOFINA BUILD-OUT AND IT WAS MATERIAL ERROR TO DO SO**

For almost ten years now, the Board has established a policy of not conditioning shippers' access to trackage rights upon a showing that a proposed line would be feasible. In both *BN/SF* and *UP/SP*, the Board made it clear that if shippers in a post-merger environment would complete a build-out to the point at which they would have reached a competing railroad (if there had been no merger), the Board would then grant trackage rights to another carrier to

operate over the line of the now merged entity to reach the point of the shipper build-out so as to provide that shipper with competitive rail service. The shipper did not have to file an individual petition to receive such competitive rail service via the trackage rights. It automatically received such rights when it completed the build-out. As the Board stated in *UP/SP*, “the only test of feasibility is whether the line is actually constructed.”<sup>22</sup>

In *CN/IC*, the Board expanded on that policy and granted shippers who would have benefited from a proposed KCS build-in direct access to KCS via haulage rights. These shippers did not have to build-out to gain access to KCS nor did they even have to build a line to reach the point at which they would have connected with the proposed KCS line. (Rubicon, Uniroyal, and Vulcan were not directly located on the proposed KCS track and each would have had to build a half-mile or more connecting track to reach the proposed KCS line). The Board did not impose a requirement on these shippers that they establish that it was feasible for them to build their connecting track, nor did the Board impose a requirement that the KCS line itself be feasible before granting these shippers access to KCS’s haulage rights. In fact, as CN acknowledges in its Reply to the Petition, KCS’s build-out proposal was not necessarily feasible at the time of CN/IC merger.<sup>23</sup> Noting “significant environmental issues,” the Board had only conditionally approved the Geismar Line build-in when it granted shippers Rubicon, Uniroyal, and Vulcan access to KCS’s haulage rights.<sup>24</sup> Thus, the Board did not condition their access on feasibility of the proposed line or of the connecting lines that Rubicon, Uniroyal, or Vulcan would have had to build.

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<sup>22</sup> *Id.*

<sup>23</sup> See CN/IC’s Reply to the Petition for Reconsideration, n.13 at 18.

<sup>24</sup> See Decision No. 37 at 33.



Notwithstanding this expansion of its prior precedents, when ATOFINA requests to be included in the Geismar Condition, establishes that it too would have benefited from the KCS build-in, and even offers to build a line to the point at which it would have connected to the proposed KCS line, the Board says “no.” In saying “no,” the Board specifically considered whether it was feasible for ATOFINA to construct a build-out to KCS’s proposed line in denying the Joint Petition. In considering ATOFINA’s proposal to construct a build-out to the Geismar industrial district, the Board concluded that “there is no evidence in this proceeding to suggest that such a line would even be feasible.”<sup>25</sup> The Board’s imposition of such an entirely inconsistent standard on ATOFINA was unfair and inequitable, especially in light of the fact that ATOFINA had no prior knowledge of the Board’s plans to consider feasibility. In fact, had it known that the Board would consider feasibility in deciding the Joint Petition, ATOFINA would have most likely presented evidence then that a proposed build-out is feasible, as ATOFINA had retained various expert opinions that a build-out to the Geismar industrial district is in fact feasible.<sup>26</sup>

In its Reply to the Petition for Reconsideration, CN/IC argues that the Board’s “passing references” to the feasibility of line construction was mere “dictum,” and thus does not constitute material error.<sup>27</sup> The text of the Board’s decision, however, clearly indicates that failure to produce evidence of feasibility was a factor in the Board’s resolution of these issues. Rubicon, Uniroyal, and Vulcan did not have to establish feasibility. KCS did not have to establish feasibility, but ATOFINA does. Its denial of the Joint Petition, in part, on ATOFINA’s failure to

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<sup>25</sup> See Decision No. 44 at 8.

<sup>26</sup> See Petition for Reconsideration at 8.

<sup>27</sup> See CN/IC’s Reply to the Petition for Reconsideration at 12, 15.

demonstrate feasibility, is thus material error which justifies reconsideration of its prior decision and reopening the *CN/IC* proceeding to grant ATOFINA access to the Geismar Condition.

**IV. THE BOARD'S ASSUMPTION THAT A PRIVATE-SECTOR RESOLUTION CAN BE ACHIEVED WITH REGARD TO THIS ISSUE IS OVERLY OPTIMISTIC**

In denying the Joint Petition, the Board suggests that ATOFINA seek a private resolution with CN/IC. This suggestion ignores both the fact that CN has not responded to ATOFINA's specific attempts to negotiate with it,<sup>28</sup> as well as the impact of the Board's decisions with respect to those negotiations. As earlier noted in this proceeding, on November 16, 2001, ATOFINA sent a letter to CN requesting CN to acknowledge that the Geismar Condition would apply to the ATOFINA traffic if ATOFINA were to build a rail line to the point where it would have connected to the proposed KCS Geismar build-in.<sup>29</sup> CN rejected that request.

About this same time, CN was proposing to build a line into the Exxon plant at Baton Rouge that was physically served by KCS but was open to reciprocal switch to CN. *See Illinois Central Railroad Company--Construction and Operation Exemption--In East Baton Rouge Parish, LA*, STB Finance Docket No. 33877 (STB served Oct. 25, 2001). KCS opposed this build-in for a variety of reasons. ATOFINA was aware of KCS's opposition to the CN build-in and KCS was aware of CN's refusal to even negotiate with ATOFINA over its concerns. With full awareness of the Board's policy favoring private sector solutions, KCS determined that a market place solution existed that would be a win-win for all the parties--CN, KCS, ATOFINA, and Exxon. Specifically, KCS would lower the reciprocal switch charge at Exxon, which would provide CN with new business and Exxon with competitive rates without the need for an expensive build-in project. In exchange, CN would amend the Access Agreement to include

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<sup>28</sup> See Petition for Reconsideration at n. 40; Joint Petition at 7 and Ex. E.

<sup>29</sup> Joint Petition at 7 and Exhibit E.

ATOFINA, which would give KCS the right to serve ATOFINA via haulage rights and would give ATOFINA competitive rates. This solution was a win-win for all.

CN rejected all of this, insisted on continuing its build-in and rebuffed ATOFINA's and KCS's request. CN felt completely free to do so because it believed that the Board would grant its construction petition for the build-in and deny any relief requested by ATOFINA. Accordingly, CN had no reason to negotiate. It could get what it wanted from the Board without negotiations. Of course the Board did precisely what CN felt it would do. Thus, the Board's statement that "[t]he situation presented here appears to be one that can be addressed through a private-sector resolution"<sup>30</sup> is naïve and unworkable, although well intentioned.

CN has no incentive to negotiate with KCS or ATOFINA. It is only through granting ATOFINA's Petition for Reconsideration that CN has any incentive to "negotiate a mutually satisfactory arrangement to provide additional access to ATOFINA." *Id.* Granting the petition places ATOFINA in a position where it would have to spend capital to build a line and places CN in the position of potentially losing all of ATOFINA's business if the line is built. These two facts provide a necessary framework for reaching a private sector solution. Without this framework, as it has before, CN will reject all efforts at a private sector solution. If private sector solutions are to be achieved, the playing field must be equal, and the way to do that is by granting ATOFINA's Petition for Reconsideration.

### CONCLUSION


Notwithstanding the fact that ATOFINA had the option of building a railroad to the point that it would have connected with the proposed KCS Geismar line and is now financially able to build that rail line, which if built would place it in the same exact geographic location and legal,

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<sup>30</sup> CN/IC Decision No. 39 at 8.

procedural, and competitive pre-merger posture as Rubicon, Uniroyal, and Vulcan, the Board has denied ATOFINA's request to be treated the same as those shippers and be included in the Geismar Condition. The Board's decision was based in large part on ATOFINA's failure to participate in the original CN/IC merger proceeding and an alleged failure to meet the criteria for reopening a merger. The Board's decision, however, was in error because it (1) imposed a requirement that ATOFINA meet the requirements for reopening a proceeding when the Board should and could have used its retained Oversight authority; (2) when applying the reopening standard, the Board did not fully consider the "changed circumstances" which ATOFINA has now completely addressed; (3) it imposed a requirement that ATOFINA first establish that its proposed build-out is "feasible" before the Board would consider whether or not to grant ATOFINA's request to be added to the Geismar Condition; and (4) it placed too much emphasis on the ability of the private sector to negotiate a solution when CN has rejected such private sector solutions advocated by both ATOFINA and KCS. The Petition for Reconsideration gives the Board an opportunity to correct its error and it should do so.

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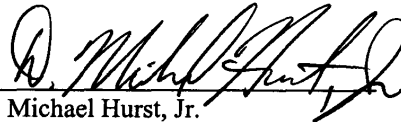
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Attorneys for The Kansas City Southern  
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September 30, 2002

**CERTIFICATE OF SERVICE**

This is to certify that I have this 30<sup>th</sup> day of September, 2002, caused the foregoing Reply of The Kansas City Southern Railway in Support of the Petition For Reconsideration of ATOFINA Petrochemicals, Inc. to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.

  
D. Michael Hurst, Jr.